United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

ORIGINAL

76-4284

United States Court of Appeals
For the Second Circuit

JOSEPH GAMBINO,
Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

Petition For Review of A Final Order Of
The Board Of Immigration Appeals

PETITIONER'S BRIEF

B
P/s

FRIED, FRAGOMEN & DEL REY, P.C.
Attorneys for Petitioner
515 Madison Avenue
New York, N.Y. 10022
(212) 688-8555

JOSEPH P. MARRO
Of Counsel

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel. (212) 447-5358

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

REGULATIONS CITED

MISCELLANEOUS AUTHORITIES CITED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-4284

JOSEPH GAMBINO,

Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITIONER'S BRIEF

Statement of the Issues:

1. Whether the decision of the Board of Immigration Appeals which denied the petitioner's application for suspension of deportation in the exercise of discretion, is arbitrary, capricious and constitutes an abuse of discretion where the petitioner has resided in the United States continuously for almost twenty years and has demonstrated substantial roots in this country.

2. Whether the decision of the Board of Immigration Appeals constitutes an abuse of discretion where the reasons set forth to deny discretionary relief are unsupported by substantial evidence and further, are stale and unconvincing in light of the petitioner's demonstrated equities.

3. Whether it was prejudicial error and contrary to elementary fairness to admit into evidence, over the petitioner's strenuous objection, an administrative report

of character investigation where such report contained multiple hearsay and was proven unreliable and incorrect.

Statement of the Case

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. Section 1105a(a), the petitioner, Joseph Gambino (hereinafter, the "Petitioner"), petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals (hereinafter, the "Board") on December 2, 1976. That decision held that although the Petitioner was statutorily eligible for suspension of deportation under Section 244 of the Act, 8 U.S.C. Section 1254, his application would be denied in the exercise of discretion (A2-5, R3-6).[1]

The Petitioner contends that the decision of the Board to decline to exercise discretion favorably, is arbitrary, capricious and constitutes an abuse of discretion in that it is premised upon factual conclusions unsupported by substantial evidence, contains erroneous conclusions and is based upon conduct which has grown stale in view of his demonstrated equities in this country. Furthermore, the Petitioner contends that it was error to admit into evidence a report of character investigation (A27-36, R478-487) which had been proven unreliable and which was intentionally designed to be prejudicial to the Petitioner.

Statement of the Facts

The Petitioner is an alien, a native and citizen of Italy. He entered the United States as a stowaway at Norfolk,

---

1. References preceded by the letter "A" refer to pages in the Appendix filed with this brief and references preceded by the letter "R" refer to pages in the Certified Administrative Record filed in this Court.

Virginia, on or about January 1, 1958. Deportation proceedings were commenced against him by the issuance of an order to show cause dated September 25, 1967. The order to show cause alleged that the Petitioner was subject to deportation under Section 241(a)(1) of the Act, 8 U.S.C. Section 1251(a)(1), as an alien who was excludable at the time of entry (A25, R72). On March 6, 1969, the Petitioner was found deportable and granted the privilege of voluntary departure (A19-24, R64-69). That decision is not under attack herein.

Pursuant to an oral stipulation entered into between the parties during the administrative proceedings (R107, 108), the hearing was reopened and the Petitioner submitted an application for suspension of deportation under the provisions of Section 244(a)(1) of the Act, 8 U.S.C. Section 1254(a)(1). Although the hearing was continued from time to time, on September 22, 1970, the hearing was closed subject to the Government submitting a report of character investigation and further, subject to reopening if the report contained any adverse information (R247-250).

More than four years later, the Government completed its report of investigation (A27-36, R478-487) and the hearing was reopened on March 17, 1975 (R251). At the reopened hearing the Government offered the report of investigation and in spite of the Petitioner's repeated objections to it (R254-257), the report was admitted into evidence (R257). The bases of the Petitioner's objections were that the report contained many misstatements of fact, was not objective in nature or scope, was based on multiple hearsay and incorrect assumptions and in general, was intentionally designed to be prejudicial to the Petitioner (R257).

During the course of the reopened hearing held on March 17, 1975, the Petitioner testified again in order to bring the record up to date. In response to questioning by

his attorney, the Petitioner stated that he was the cousin of Carlo Gambino (R263).[2] Further, he testified to the extreme hardship that his wife and family would suffer if he were compelled to leave the United States. (R268) At the conclusion of his testimony, the Petitioner called Rosalie Gambino, his wife, and a citizen of the United States, in support of the application. She testified that she was married to the Petitioner on July 26, 1970 (R283) and was then expecting their first child (R283).[3] She also testified to the extreme hardship she would suffer and as to her love and need for the Petitioner (R284, 285). At the conclusion of this hearing, the Immigration Judge granted the Petitioner's request to submit rebuttal testimony to the report of investigation (R287) and the proceedings were then adjourned to July 14, 1975 (R289).

At the continued hearing held on July 14, 1975, the Petitioner called as adverse witnesses, Stephen Edwards, a Special Agent of the Federal Bureau of Investigation (R290), regarding his statements contained in the report of investigation, and Robert F. Honan, Criminal Investigator, Immigration and Naturalization Service (R313), the individual who prepared the report.

With respect to Mr. Edwards, the Petitioner contended that the report attempts to taint him unjustifiably with guilt by association. Mr. Edwards was then examined as to his conclusory statements concerning particular locations and individuals (R295-298). Further, Mr. Edwards was examined about his notes of a surveillance of the Petitioner conducted on March 1, 1972, annexed to and made a part of the report of investigation. Upon examination it became

---

2. Carlo Gambino, prior to his death, was reputed to be the head of organized crime in this country. It is primarily this fact that the Petitioner believes underlies the decision to deny discretionary relief.

3. The child, Frances Gambino, was born on July 13, 1975 (R342). Since the hearing closed, the Gambinos have a second child, Angela Gambino, born to them on or about September 12, 1976.

apparent that the incident on March 1, 1972 was indeed uneventful but impregnated with artificial and highly prejudicial inferences designed to reflect unfavorably upon the Petitioner. (R306-312).

Following Mr. Edwards, the Petitioner called Robert Honan, the Immigration Officer who prepared the report. Mr. Honan, was examined about his statements in the report of investigation concerning the Petitioner's first marriage (R314, 315), the Petitioner's convictions in Italy, some of which were in absentia (R316-318), his erroneous statements as to a particular tax matter (R319, 320), the Petitioner's associates (R322-325) and other matters (R326-329).

In view of the doubt suggested in the report of character investigation (A27, 28, R478, 479) concerning the actual date the Petitioner entered the United States, the Petitioner called a witness, John Gambino, a naturalized citizen of the United States, who testified to the Petitioner's presence in this country from 1958 to the present (R331-333). In addition, the Petitioner introduced into evidence a series of photographs taken of him in the United States, dated from 1958 to 1960 (R342; Exhibit 19, R710-717), in order to prove that he was in this country from at least 1958 to the present.

Before the hearing concluded, the Immigration Judge questioned the Petitioner concerning certain tax returns attached to the report of investigation as Exhibits 14D and 14E (R591-621), and which contained the signature of one, Joseph Lambino. The Government contended that the Petitioner had signed the returns under a false name and thus illegally split his income. The Petitioner categorically denied that he ever signed these returns or used the name Lambino during the years specified on the tax returns (R370). Because a new issue was raised as to the Petitioner's veracity, the matter was continued to permit him to support his assertion.

The hearing was again continued on November 25, 1975 and the Petitioner, upon consent of the Government, introduced into evidence the affidavits of two private investigations which demonstrated that there was indeed, an individual (not Joseph Gambino) with the name Joseph Lambino (R389; Exhibit 22, R731-746). Furthermore, in addition to other documentation offered into evidence by the Petitioner, testimony was taken from Hugh L. Sang, a handwriting expert, to the effect that the signatures of the individual, Joseph Lambino, were not those of the Petitioner, Joseph Gambino (R391-399). Finally, two additional individuals, Anthony Guarino (R399) and Giacomo Buscemi (R405), were called by the Petitioner. They testified that they were co-workers with Joseph Lambino and that based on their personal knowledge of Joseph Lambino, he was clearly not the Petitioner, Joseph Gambino.

At the conclusion of the hearing of November 25, 1975, the Government was given a period of time to produce any further evidence it chose in order to rebut any portion of the Petitioner's proof. The Government did not produce any information and the hearing was finally closed and the decision reserved.

On March 31, 1976, Immigration Judge Henry I. Millman rendered his decision in the matter (A6-18, R45-57). He found that the Petitioner was statutorily eligible for suspension of deportation but denied the application purely in the exercise of discretion. He did however, grant the alternative relief of voluntary departure. The Petitioner appealed that decision to the Board of Immigration Appeals (R43) and oral argument was heard by the Board on September 27, 1976 (R8-22).

On December 2, 1976, the Board rendered its decision and affirmed the decision of the Immigration Judge, although it did so without accepting all the reasons relied

upon by the Immigration Judge. The decision of the Board again found the Petitioner statutorily eligible for suspension of deportation but denied that relief in the exercise of discretion (A2-5, R3-6). In so doing, the Board relied upon five factors to deny relief (A4, R5).

This petition for review was then filed in this Court on December 30, 1976, seeking review of that decision.

RELEVANT STATUTE

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 244(a)(1), 8 U.S.C. Section 1254(a)(1) . . .

> As hereinafter prescribed in this Section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
>
> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parents, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;

ARGUMENT

THIS PETITION FOR REVIEW SHOULD BE GRANTED AND THE DECISION OF THE BOARD REVERSED

POINT I

THE DECISION TO DENY SUSPENSION OF DEPORTATION AS A MATTER OF DISCRETION IS ARBITRARY, CAPRICIOUS AND CONSTITUTES AN ABUSE OF DISCRETION AND AS SUCH MUST BE SET ASIDE.

In order to qualify for suspension of deportation, an alien must first satisfy the three statutory requirements contained in Section 244(a)(1) of the Act, 8 U.S.C. Section 1254(a)(1). He must demonstrate:

> (I) Seven years continuous residence in the United States;
>
> (II) good moral character throughout the seven year period; and
>
> (III) a showing of extreme hardship to the alien or a close family member who is a citizen or permanent resident of the United States.

Of course, the applicant for suspension has the burden of showing that he meets these prescribed conditions. *Kimm v. Rosenberg*, 363 U.S. 405, 80 S.Ct. 1139 (1960), *rehearing denied*, 364 U.S. 854, 81 S.Ct. 30; *Brownell v. Cohen*, 250 F. 2d 770 (D.C. Cir. 1957); 8 CFR 242.17(d). If the alien satisfies the statutory criteria for eligibility, he must then present sufficient equities to establish that he merits the favorable exercise of discretion. *Wong Wing Hang v. Immigration and Naturalization Service*, 360 F. 2d

715 (2nd Cir. 1966). Finally, those applications which are approved by the Attorney General or his delegate must ultimately be referred to the Congress for final legislative approval. Section 244(c) of the Act, 8 U.S.C. Section 1254(c); *McGrath v. Kristenson*, 340 U.S. 162, 71 S.Ct. 224 (1950).

Although the road to suspension of deportation is long, the applicant for this relief must travel it by taking one step at a time and the closer he gets to his goal, the more difficult his journey becomes. In the present case, the Petitioner sustained his burden of proof and was found statutorily eligible for this relief in that he satisfied each of the aforementioned criteria, namely the Immigration Judge determined that he (1) had seven or more years of continuous residence in the United States (II) was a person of good moral character for the preceding seven years and (III) established that his deportation would result in extreme hardship to himself and his United States citizen wife and child (A8, 9, 16, R47, 48, 55). That finding was adopted by the Board in its decision of December 2, 1976 (A3, R4). Having satisfied the statutory criteria, the Board then chose to deny suspension of deportation to the Petitioner purely in the exercise of discretion.

It is well settled, that the discretionary denial of such applications are reviewable in this Court for the purpose of determining whether the administrative action was arbitrary, capricious or constituted an abuse of discretion. *Foti v. Immigration and Naturalization Service*, 375 U.S. 217, 84 S.Ct. 306 (1963); *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 77 S.Ct. 618 (1957); *Wong Wing Hang v. Immigration and Naturalization Service, supra; Kam Ng v. Pilliod*, 279 F. 2d 207 (7th Cir. 1960), *cert. denied*, 365 U.S. 860, 81 S. Ct. 828 (1961); *Rassano v. Immigration and Naturalization Service*, 492 F. 2d 220 (7th Cir. 1974). Furthermore, it is equally well settled that this Court cannot substitute its judgment for that of the

agency. *Khalil v. District Director of U.S. Immigration and Naturalization Service*, 457 F. 2d 1276 (9th Cir. 1972). However, the Petitioner contends that in view of the various errors in the Board's decision and upon a balancing of the strong equities in his favor, as demonstrated from the record as a whole, the decision should be reversed and the matter remanded to the Board to grant relief.

In initiating our inquiry into the validity of the Board's decision we must begin by referring to the leading case in this Circuit on the issue of abuse of discretion, *Wong Wing Hang v. Immigration and Naturalization Service, supra,* and look to that Court's language as our judicial yardstick. There Judge Friendly held (at page 719):

> (W)e think the denial of suspension to an eligible alien would be an abuse of discretion if it were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group, or, in Judge Learned Hand's words, on other "considerations that Congress could not have intended to make relevant."

[citing, *United States ex rel. Kaloudis v. Shaughnessy*, 180 F. 2d 489, 491 (2nd Cir. 1950].

Furthermore, in reviewing factual findings made by the administrative agency on which to premise a discretionary denial of suspension of deportation, those findings must pass the substantial evidence test. *Wong Wing Hang v. Immigration and Naturalization Service, supra,* at p. 717.

In examining the basis for the Board's conclusion, the Petitioner submits that the decision clearly constitutes an abuse of discretion. The foundation for the Board's decision is summarized on page 3 of that decision (A4, R5). For purposes of simplicity, we shall discuss each of the elements which formed the basis of the Board's decision separately.

1. Entry as a Stowaway: The Board found that the manner in which the Petitioner entered the United States was particularly significant with regard to the unfavorable exercise of discretion. However, we urge this Court to adopt the reasoning of the Ninth Circuit which takes a totally opposite view in accordance with congressional policy. In *Siang Ken Wang v. Immigration and Naturalization Service,* 413 F. 2d 286 (9th Cir. 1969), the Court reversed and remanded the decision of the Board in denying a suspension application because that decision was based, in part, on the manner of the alien's entry. There, the Court reviewed the Congressional history of Section 244 of the Act, 8 U.S.C. Section 1254, whereby in 1965, Congress amended that section to delete the exclusion of crewmen from relief. The Court concluded that since Congress has chosen not to make the manner of entry into the United States a consideration for this form of relief, it was error for the Board to have done so. See: *1965 U.S. Code Cong. and Adm News,* 89th Cong. 1st Sess. p. 3328, at p. 3339.[4] See also: *Asimakopoulos v. Immigration and Naturalization Service,* 445 F. 2d 1362 (9th Cir. 1971); *United States ex rel. Hintopoulous v. Shaughnessy, supra.*

Thus, since the Board premised its conclusion partly on a consideration that Congress did not consider relevant, the decision must be regarded as an abuse of discretion as defined in *Wong Wing Hang v. Immigration and Naturalization Service, supra.* Certainly, even if this Court were unwilling to follow the Ninth Circuit, nevertheless, the manner of entry should be given little weight in comparison to the substantial equities in the Petitioner's favor, discussed *infra.*

---

4. Because of its significance, the relevant portion of Senate Report No. 748 in *1965 U.S. Code Cong. and Adm. News* is set forth as follows:

> "The Committee feels that no distinction should be made in the treatment of aliens because of their manner of entry where they meet the other conditions which would qualify them for that form of discretionary relief. (at p. 3339)."

2. Conviction for False Claim of Citizenship. The decision correctly refers to a conviction for an oral claim to citizenship in violation of 18 U.S.C. Section 911, and indeed the Petitioner does not, and cannot, seek to collaterally attack that conviction. However, it is proper to consider the facts and circumstances surrounding the conviction for the purpose of evaluating discretionary relief or the denial thereof. The incident that gave rise to the conviction occurred on June 8, 1967 wherein it was claimed that the Petitioner was approached at work by an agent of the Federal Bureau of Investigation and was alleged to have made an oral claim of citizenship. Almost five years later and not until seven days before the statute of limitations ran, the indictment issued (June 1, 1972, R672).

The Petitioner contends that in view of the fact that this conviction did not involve a violent crime, was not directed against any individual, was not made under oath, and related to an incident that occurred nearly a decade ago (June, 1967), it should be considered of minimal significance, especially since it is the Petitioner's only conviction in almost twenty years of residence in this country.

3. History of Convictions in Italy. Another factor considered by the Board in declining to exercise discretion in the Petitioner's favor, is his record of several Italian convictions. The administrative record contains eight such convictions of the Petitioner in Italy but two of them were made *in absentia.* Of course, the two convictions rendered *in absentia,* must be deemed of no value as having been obtained in violation of due process of law. See: *Ex parte Koerner,* 176 Fed 478 (E.D. Wash. 1909). As to the remaining convictions, the Board failed to consider the Petitioner's compelling explanation for these crimes, which is set forth as follows:

> RESPONDENT:—I was desperate. I was out of work. My mother was sick. All of us were doing

> this. We would take wine from one place and transport it to another place, trying to avoid paying taxes, trying to save some money to feed the family, to save the family from famine (R94).

Moreover, Immigration Judge Millman and the Board failed to remember or even to consider the earlier decision of Judge Millman, dated March 6, 1969, wherein he took cognizance of the special circumstances surrounding these convictions. At that time, Judge Millman determined:

> . . . Although his criminal record, to the extent that it has been established by the evidence in this case is not to be ignored, his testimony indicates that he resorted to transporting wine without payment of tax because he was in desperate straits by reason of the fact that he was unemployed and that his mother was sick. In any event, these offenses occurred over ten years ago. (A21, R66).

Thus, in view of the fact that these convictions occurred now more than twenty years ago, their significance has grown stale, especially when considered in light of the special circumstances surrounding them and the Petitioner's almost spotless criminal record in the United States.

4. Failure to Comply with the Alien Registration Requirements. Although the failure to report an alien's address has been held to be a proper factor in evaluating discretionary relief by the First Circuit in *Goon Wing Wah v. Immigration and Naturalization Service*, 386 F. 2d 292 (1st Cir. 1967), the Petitioner contends that this Court should decline to follow that decision. We submit that the vast majority of aliens who enter the United States each year and continue to reside here do not report their addresses (most probably through ignorance of this requirement) and the Immigration Service never considers this in applying discretionary relief, except in a few cases where it chooses to support a denial of discretionary relief.

In the present case, the Petitioner testified that he did not report his address because he too was unaware that he was required to do so (R99, 100). Certainly, it is conceivable that a foreigner who enters the United States for the first time at the age of twenty-eight, with no knowledge of the English language, is totally ignorant of this obligation and it is equally conceivable that he has no method to learn of such a requirement. Furthermore, there is no evidence in the record which disproves his testimony on this issue. We submit, therefore, that in the absence of a showing that the Petitioner had *actual knowledge* of this requirement, he cannot, and should not, be held accountable for his ignorance, especially when this criterion is intended to be selectively applied to him by the Respondent.

Furthermore, when the Petitioner was informed of this requirement in 1967 he has continually reported his address for each succeeding year thereafter. Consequently, it is our contention that this factor must be disregarded in view of its selective use in this case, and in view of the Petitioner's ignorance of this requirement. Moreover, even if this Court were to consider it, upon balance, the Petitioner's recent conduct must be given more weight than remote conduct occurring almost a decade ago.

5. *Intent to Avoid Apprehension By Obtaining a False Social Security Card.* The Board also determined that discretion should be denied to the Petitioner because he had obtained a social security card in 1960 under the name of an alias, Joseph Lambino with the intent to avoid apprehension by the Service (A4, R5). Apparently, the Board based its conclusion solely on the testimony of the Petitioner that he intended at one time to avoid detection by the Immigration authorities (R98). However, in so doing, the decision places unfair weight on one's intention nineteen years ago when he arrived in a new country and in

an uncertain atmosphere. To the contrary, the Board should have considered what *actually* occurred, not what *may have been intended.* The testimony is clear and totally uncontradicted that although the Petitioner did obtain a social security card in 1960 under the name Joseph Lambino, he *never used it* and in fact, threw it away (R15, 367, 368, 371, 372). The only time the name Lambino ever surfaced, was on the tax returns of Joseph Lambino, which the Immigration Judge concluded were not those of the Petitioner herein (A14, R53). Thus, since the record is devoid of any showing that the Petitioner *used* the false card to avoid detection by the Service, the Board's finding lacks substantial evidence to support its conclusion. Accordingly, reliance upon this fact is indeed misplaced and in our view must again be disregarded.

Therefore, the Petitioner argues that if this Court agrees with him that all, *or any,* of the aforementioned grounds upon which the Board premised its decision to deny relief, are incorrect, the Court must reverse the decision and remand it to the agency with instructions to grant the application or to reconsider it in accordance with its instructions. *Clay v. United States,* 403 U.S. 698, 91 S. Ct. 2068 (1971); *Sicurella v. United States,* 348 U.S. 385, 75 S. Ct. 403 (1955); *Stromberg v. California,* 283 U.S. 359, 51 S. Ct. 532 (1931); *Siang Ken Wang v. Immigration and Naturalization Service, supra; Kovac v. Immigration and Naturalization Service,* 407 F. 2d 102, 107 (9th Cir. 1969).

Moreover, in passing upon the Petitioner's application for suspension of deportation, the Board improperly failed to consider and give proper weight to the substantial equities in his favor. In fact, a single most important factor in evaluating the favorable exercise of discretion is the demonstration of an applicant's substantial roots in the United States. *United States ex rel. Hintopoulos v. Shaughnessy, supra; Jarecha v. Immigration and Naturalization Service,* 417 F. 2d 220 (5th Cir. 1969); *Soo*

Yuen v. U.S. Immigration and Naturalization Service, 456 F. 2d 1107 (9th Cir. 1972); *Santos v. Immigration and Naturalization Service,* 375 F. 2d 262 (9th Cir. 1967).

Once again, for the purpose of clarity, we shall discuss each of the factors which demonstrate the Petitioner's substantial roots in this country and the equities which weigh heavily upon the favorable exercise of discretion.

(A) *Long Period of Continuous Residence:* Nowhere in the decision does the Board give proper weight to the more than *nineteen years* of the Petitioner's continuous physical presence in the United States. The Petitioner testified that he entered this country in January 1958, and has resided here continuously since that time. Although the Government appeared to be uncertain as to the actual date of entry, the record is uncontroverted on this fact. Moreover, the Petitioner's testimony is corroborated by the testimony of John Gambino (R331-340) as well as by a series of photographs of the Petitioner in the United States during the period in question. Accordingly, we submit, that the decision herein fails to give proper weight to the Petitioner's almost twenty years of continuous residence in this country.

(B) *United States Citizen Spouse and Children:* A significant factor in considering discretionary relief has always been the applicant's relationship to citizens or permanent residents of the United States. In the present case, the Petitioner was married to Rosalie Ann Gambino on July 26, 1970, a United States citizen by virtue of her birth here (R283). Additionally, they have two children Frances Gambino, born in the United States on July 13, 1975 (R342) and Angela Gambino, born in the United States on or about September 12, 1976. Accordingly, the Board should have placed more significance on the factors of a citizen wife and children as weighing heavily in the Petitioner's favor.

(C) *Employment History:* Ever since his entry into the United States, the Petitioner has been able to be self-sustaining and has never required public assistance. He has obtained employment in a butcher shop, the garbage carting business and the restaurant business. Furthermore, another important factor which was not properly evaluated in considering the application for discretionary relief, is the Petitioner's substantial investment in business in this country. He testified that he is a part-owner of Joe's Pizza Incorporation, which operates a pizza establishment and also a restaurant (R268-271, 360, 361). Additionally, if the Petitioner were to be deported from the United States, not only would he lose his investment but several of his employees would also lose their jobs.

(D) *Inability to Obtain Employment in Italy and Support his Family:* The Petitioner is a forty-seven year old male individual who has been away from Italy for almost two decades. He has spent the majority of his adult years in this country and has grown accustomed to the American way of life. He also has testified that because he had been away from Italy for so long and because of his age, he will find it difficult—if not impossible—to obtain employment in Italy, if deported (R352). Certainly, due to the unstable conditions presently existing in Italy and its high unemployment rate, it would indeed be difficult for the Petitioner to obtain a livelihood there or to make sufficient money to support two households.

Thus, in evaluating the entire record in this case and upon a balancing of the respective interests, with due weight being given to the substantial equities in favor of the Petitioner, his most recent conduct and the consequent hardship to his citizen wife and family, it is clear that his application should have been granted. Furthermore, in view of the errors in the decision as set forth above, the decision to deny suspension of deportation must be set aside as arbitrary, capricious and an abuse of discretion.

POINT II

THE ADMISSION OF THE REPORT OF INVESTIGATION WAS PREJUDICIAL ERROR.

The deportation hearing in this matter was originally closed on September 22, 1970, pending the conduct of a character investigation by the Immigration and Naturalization Service. For whatever reason, it took the Government more than four years to complete its inquiry and the Petitioner was then informed that the hearing was to be reopened for the sole purpose of permitting the Government an opportunity to present additional evidence (R253).

At the hearing held on March 17, 1975, the Government offered into evidence its ten page report of investigation (A27-36, R478-487) and the numerous exhibits attached thereto (R488-699). In response, counsel for the Petitioner objected to its introduction into evidence on the grounds that it contained hearsay information and was totally unsupported by substantial evidence. Furthermore, counsel for the Petitioner not only had specific objections to particular items contained in the document but also entered a general objection to the entire report as being intentionally inflamatory and prejudicial to the Petitioner (R254-257).

Initially, we note that hearsay evidence is admissible in an administrative hearing as the strict rules of evidence required in a judicial proceeding do not apply. *United States ex rel. Vajtauer v. Commissioner,* 273 U.S. 103, 47 S. Ct. 302 (1927); *Marlowe v. U.S. Immigration and Naturalization Service,* 457 F.2d 1314 (9th Cir. 1972); *Maroon v. Immigration and Naturalization Service,* 364 F. 2d 982 (8th Cir. 1966). However, while this may be a general rule, it is not without strict limitations to ensure that the particular hearsay item has in fact some probative

value and is uncontroverted. In such cases, the Court has the power to scrutinize the agency action to insure the essential fairness of the procedure. *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 74 S. Ct. 499, (1954).

In the *Vajtauer* case, *supra,* the Government sought the deportation of the alien on the ground that he actively advocated the overthrow of the United States by force. In the course of the proceedings, the Government offered into evidence a pamphlet bearing his name as the author of an article advocating the overthrow of the government by revolution. There, the Court upheld the admissibility of the hearsay pamphlet but only because its probative value became strengthened by the silence of the alien who refused to testify in his own defense. In commenting on this case, Professor Kenneth Culp Davis says "The hearsay might not have been substantial evidence if it had been denied and if the denial had been convincingly supported." *Davis, Administrative Law Treatise,* vol. *2,* Section 14.10, p. 298 (1958).

In the present case, the Petitioner denied most of the facts contained in the report and presented evidence to the contrary. Typical of some of the inaccuracies and highly prejudicial accusations contained in the report are the following examples:

Although the report seems to suggest that the Petitioner's first marriage was entered into in order to avoid deportation, the writer of the report, Mr. Honan, admitted that he had no knowledge if they ever lived together, never spoke with any neighbors or associates of the parties and didn't even know the grounds for the divorce (R315). In fact, his conclusion was pure speculation and totally contradicted by the testimony of the Petitioner (R341).

Additionally, the report contains the totally unsupportable conclusion that "It is a matter of record that

SUBJECT utilized the alias JOSEPH LAMBINO and Social Security Account Number in filing U.S. Income Tax Returns for the years 1964 . . . . 1969". (A30, R481). To the contrary, by a vast preponderance of evidence which was totally uncontroverted, the Petitioner demonstrated that he never filed false income tax returns. In so doing, the Petitioner elicited the testimony of a handwriting expert who testified that the signatures on the tax returns under the name Lambino were not those of the Petitioner (R391-399); the Petitioner also retained the services of two private investigators who submitted their report with supporting documentation under oath (and with the Government's consent) confirming the existence of a Joseph Lambino (R389; Exhibit 22, R731-746) and further, the Petitioner presented two individuals and co-workers of Joseph Lambino who testified to their personal knowledge of Mr. Lambino (R391-405).

Additionally, the allegation that the Petitioner illegally split his income must also fall as it was based upon a totally erroneous supposition in that the report failed to mention that with respect to the tax years in issue, they had been settled by stipulation and the payment of a meager amount of money (Exhibit 15, R701).

Indicative of the highly prejudicial aspect of the report, is its constant allusion to associates of the Petitioner as being known criminals—a fact the Immigration Judge must have deemed significant by his lengthy discussion in his opinion (A10-12, R49-51). However, although the FBI agent characterized certain people as "known criminals", his definition of a "known criminal", we submit, is erroneous. In response to counsel's question for a definition of a "known criminal" he responded "It's a person who has a rap sheet (also known as yellow sheet or arrest record) or has been arrested before, . . . " (R298). Again we submit, mere arrests without convictions are

totally irrelevant. In short, the constant allusion to associates of the Petitioner as being "known criminals" is an attempt to stigmatize him with guilt by association. Clearly, such an attempt is erroneous as a matter of law and Courts have held that it is an abuse of discretion to deny relief based on such tactics. *Rassano v. Immigration and Naturalization Service, supra.*

It is the Petitioner's contention, therefore, that since the report of investigation was clearly hearsay evidence and that based upon the overwhelming showing of the numerous inaccuracies contained in it, the report had been so totally discredited that it lost all probative value. Further, although the Immigration Judge and the Board, apparently in recognition of the untrustworthiness of the report, attempt to assert that no weight was given to the report, this contention is meritless. In the exercise of discretion, it is difficult to accept that so highly prejudicial a report, impregnated with highly inflamatory inferences, could be disregarded, whether consciously or subconsciously. Moreover, the Board does admit that it relied upon particular exhibits to the report (without enumeration) in reaching its decision (A4, R5).

Accordingly, we submit that it was prejudicial error to allow into evidence the report of investigation and that by so doing, the objective exercise of discretion had been seriously influenced to the detriment of the Petitioner.

CONCLUSION

The Petition for Review should be Granted and the Decision of the Board of Immigration Appeals set aside.

Respectfully submitted,

FRIED, FRAGOMEN & DEL REY, P.C.
Attorneys for the Petitioner
515 Madison Avenue
New York, N.Y. 10022

JOSEPH P. MARRO
Of Counsel

FRIED, FRAGOMEN

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 15 day of March ,1977 at No. 1 St. Andrews Pl., NYC

deponent servied the within ~~Petition~~ Brief

upon U.S. Atty., So. Dist. of nY

the Respondent herein, by delivering 3 true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Respondent therein.

Sworn to before me this
15 day of March 197)

Edward Bailey

WILLIAM [illegible]EY
Notary Public, St[illegible] of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978